UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

IN RE THE APPLICATION OF REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS FOR ACCESS TO CERTAIN SEALED COURT RECORDS	Misc. Action No. _____________ Related to: Criminal No. 1:10-cr-00181-RDB **Oral Argument Requested**

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE APPLICATION OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS FOR PUBLIC ACCESS TO CERTAIN SEALED COURT RECORDS

Katie Townsend
Bar No. 19756
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1250
Washington, DC 20005
Phone: 202.795.9300
Facsimile: 202.795.9310
ktownsend@rcfp.org

Counsel of Record for Applicant the Reporters Committee for Freedom of the Press

Bruce Brown*
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1250
Washington, DC 20005
Phone: 202.795.9300
Facsimile: 202.795.9310

**Of Counsel for Applicant the Reporters Committee for Freedom of the Press*

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Marc Ambinder, *NSA Employee Indicted for 'Trailblazer' Leaks*, The Atlantic (Apr. 15, 2010), *available at* https://perma.cc/RVP9-WTGN 3
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PRELIMINARY STATEMENT

The Reporters Committee for Freedom of the Press ("Reporters Committee") seeks access to certain sealed court records, including dockets and docket entries, relating to the completed criminal investigation and prosecution of Thomas Andrews Drake ("Drake") (hereinafter, the "Drake Matter"). Specifically, the Reporters Committee seeks an order unsealing any and all applications and supporting documents, including affidavits, seeking any of the following; any court orders granting or denying any of the following; and any other court records related to the following, such as returns, motions to seal, dockets, and docket entries:

- any search warrant, regardless of whether the warrant was issued or executed, and including warrants under the Stored Communications Act ("SCA"), *see* 18 U.S.C. §§ 2701–2712, that relates to the Drake Matter (collectively, the "Search Warrant Materials");
- authorization for the use of any pen register or trap and trace device pursuant to 18 U.S.C. §§ 3121–3127, regardless of whether such authorization was granted or a pen register or trap and trace device was used, that relates to the Drake Matter (collectively, the "PR/TT Materials"); and
- any order pursuant to 18 U.S.C. § 2703(d) of the SCA, regardless of whether or not the order was issued or executed, that relates to the Drake Matter (collectively, the "Section 2703(d) Materials").

Court records of this type are routinely maintained under seal and are generally not reflected on publicly available dockets. Accordingly, the Reporters Committee does not know and cannot ascertain the docket number(s) associated with the Search Warrant Materials, PR/TT Materials, and Section 2703(d) Materials it seeks to unseal.

The government's prosecution of Drake for allegedly disclosing classified national defense information to a journalist was and remains the subject of intense public interest. Unsealing the Search Warrant Materials, PR/TT Materials, and Section 2703(d) Materials will shed light on the government's investigation and prosecution of Drake, which has concluded, and will also provide the public and the press with valuable insight into the government's investigation and prosecution of "leaks" to the media more generally. In particular, unsealing of these materials will inform the public about the government's use of electronic surveillance tools like PR/TT devices and Section 2703(d) orders in connection with such investigations.

FACTUAL BACKGROUND

I. The government's investigation and prosecution of Drake is a matter of ongoing public interest.

In June 2011, Drake, a former National Security Agency ("NSA") employee, pled guilty to a single count of exceeding his unauthorized use of an agency computer in violation of 18 U.S.C. § 1030(a)(B). In July 2011, Drake was sentenced to one year of probation and 240 hours of community service, and ordered to pay a $25 assessment. *See* Judgment, *United States v. Drake*, No. 1:10-cr-00181-RDB ("*Drake*") (D. Md. filed Jul. 15, 2011), ECF No. 169.

Drake's indictment and subsequent guilty plea arose out of a government investigation into his communications with a member of the news media. According to the indictment, Drake disclosed intelligence information to an unnamed journalist identified therein as "Reporter A," who published the information in a series of articles. *See* Indictment, *Drake* (D. Md. filed Apr. 14, 2010), ECF No. 1, at ¶ 13 (the "Indictment"). Several news organizations reported that the journalist was Siobhan Gorman, a former reporter for the *Baltimore Sun* who covered intelligence agencies. *See, e.g.*, Scott Shane, *Former N.S.A. Official is Charged in Leaks Case*, N.Y. Times (Apr. 15, 2010), *available at* http://nyti.ms/1BQCo4B; Marc Ambinder, *NSA*

Employee Indicted for 'Trailblazer' Leaks, The Atlantic (Apr. 15, 2010), *available at* https://perma.cc/RVP9-WTGN. In 2006 and 2007, the *Baltimore Sun* published a series of articles by Ms. Gorman discussing waste and mismanagement at the NSA (the "Gorman Articles"). *See* Ellen Nakashima, *Former NSA Executive Thomas A. Drake May Pay High Price for Media Leak*, Wash. Post (Jul. 14, 2010), *available at* https://perma.cc/4ABQ-7TE3; *see also* Siobhan Gorman, *Management Shortcomings Seen at NSA*, Baltimore Sun (May 6, 2007), *available at* https://perma.cc/8358-AZME; Siobhan Gorman, *NSA Rejected System That Sifted Phone Data Legally*, Baltimore Sun (May 18, 2006), *available at* https://perma.cc/XZP7-B82C. News organizations also reported that during his tenure at the NSA, Drake used sanctioned channels to lodge complaints about waste, mismanagement, and privacy violations at the NSA, but felt that his concerns were not addressed. *See* Nakashima, *supra*; David Welna, *Before Snowden: The Whistleblowers Who Tried to Lift the Veil*, NPR (Jul. 22, 2014), *available at* https://perma.cc/T7F7-GZAE.

The government's prosecution of Drake was an immediate subject of intense public interest. The media reported extensively on the Drake Matter and its relationship to other government leak investigations and prosecutions. *See, e.g.*, Nakashima, *supra*; *The Espionage Act: Why Tom Drake Was Indicted*, 60 Minutes CBS News (May 22, 2011), *available at* https://perma.cc/VN5H-B8YC; *Ex-Official for N.S.A. Accepts Deal in Leak Case*, Reuters (Jun. 10, 2011), *available at* http://nyti.ms/1L5IUuh. Although the Drake Matter ended years ago, public interest in it has continued. That interest was heightened in 2013, when former NSA contractor Edward Snowden leaked top-secret NSA documents to a number of journalists, and in 2015, when Mr. Snowden told an interviewer: "It's fair to say that if there hadn't been a Thomas Drake, there wouldn't have been an Edward Snowden." *See* Mark Hertsgaard, *How the*

Pentagon Punished NSA Whistleblowers, Guardian (May 22, 2016), *available at* https://perma.cc/Y4FP-87HV; *New PEN Reporter Reveals High Risks for National Security Whistleblowers*, PEN America (Nov. 9, 2015), *available at* https://perma.cc/KZL4-8NSL.

II. Search Warrant Materials, PR/TT Materials, and Section 2703(d) Materials related to the Drake Prosecution remain under seal.

Documents filed with the Court in the Drake prosecution indicate that the government likely sought and obtained search warrants, pen register and/or trap and trace devices,[1] and/or Section 2703(d) orders[2] from the district court in the course of its investigation of Drake.

Specifically, during the discovery phase of the Drake prosecution, the government filed a series of status reports with the Court indicating that it had gathered phone records, applied for and executed search warrants, gathered the results of search warrants, collected e-mails sent to and from Drake's NSA e-mail address, and seized roughly fifteen computer hard drives from Drake's home. *See* Discovery Update, *Drake* (D. Md. filed Aug. 26, 2010), ECF No. 22, at 2–4 ("First Status Report"). In advance of a telephonic status conference scheduled for August 27, 2010, the government filed a status report describing discovery materials it had provided to Drake, which listed the aforementioned categories of documents. *See* First Status Report, *supra*.

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[1] Pen registers and trap and trace devices are law enforcement surveillance tools the use of which is governed by 18 U.S.C. §§ 3121–3127 (the "Pen Register Act" or "PRA"). "Pen registers record telephone numbers, e-mail addresses, and other dialing, routing, addressing, or signaling information that is transmitted by instruments or facilities—such as telephones or computers—that carry wire or electronic communications." OIG, *A Review of the FBI's Use of Pen Register and Trap and Trace Devices Under the Foreign Intelligence Surveillance Act in 2007 through 2009 — Executive Summary* at 1 (June 2015), *available at* https://oig.justice.gov/reports/2015/o1506.pdf. "Trap and trace devices record similar information that is *received* by such instruments or facilities." *Id*. (emphasis added).

[2] Under 18 U.S.C. § 2703 of the Stored Communications Act ("SCA") a court may issue an order authorizing the government to require electronic communication service or remote computing service providers to disclose the contents of a subscriber or consumer's wire or electronic communications in electronic storage for more than 180 days and certain communications metadata related to a subscriber or customer. 18 U.S.C. § 2703(a), (b)(1), (c)(1)-(2).

The status report stated that the government had provided Drake with the unclassified discovery, as well as the majority of the classified discovery, with the exception of certain computer hard drives seized from Drake's residence. *See id.* Approximately one month later, in advance of a discovery status conference scheduled for September 24, 2010, the government filed a second status report describing outstanding discovery disputes which acknowledged the existence of more specific categories of discovery materials, such as e-mails between Drake and Reporter A. *See* Second Status Report, *Drake* (D. Md. filed Sep. 23, 2010), ECF No. 23 ("Second Status Report"). Thus, the government, as part of its investigation of Drake, appears to have utilized electronic surveillance tools to target at least one journalist's communications records. *See generally id*. (noting one journalist that Drake communicated with).

The Reporters Committee is not aware of any search warrants, orders authorizing the use of pen registers and/or trap and trace devices, or Section 2703(d) orders, or any applications or other materials related thereto, connected to the Drake Matter that have been unsealed. The Reporters Committee therefore requests that such court records—including the relevant dockets and docket sheets—be unsealed, and that, to the extent necessary to facilitate such unsealing, the U.S. Attorney be directed to provide a list of the specific docket numbers associated with the applications and orders that are sought by this Application.

ARGUMENT

I. The press and the public have a powerful interest in access to the Warrant Materials, PR/TT Materials, and Section 2703(d) Materials still under seal that relate to the Drake Matter.

Openness is "an indispensable attribute" of our judicial system. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980). It guards against unfairness and inequity in the application of laws, as "the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known." *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 508 (1984) ("*Press-Enterprise I*") (emphasis in original). "[P]ublic access promotes not only the public's interest in monitoring the functioning of the courts but also the integrity of the judiciary." *Doe v. Pub. Citizen*, 749 F.3d 246, 266 (4th Cir. 2014) ("*Pub. Citizen*"). Perhaps just as importantly, access also "provide[s] the public with a more complete understanding of the judicial system, including a better perception of fairness." *Id.* (quoting *Littlejohn v. Bic Corp*., 851 F.2d 673, 682 (3d Cir. 1988)). As the U.S. Supreme Court has explained, "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers*, 448 U.S. at 572.

The U.S. Supreme Court has also recognized that the news media plays a vital role in facilitating public monitoring of the judicial system.

> A responsible press has always been regarded the handmaiden of effective judicial administration, especially in the criminal field. . . . The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.

Sheppard v. Maxwell, 384 U.S. 333, 350 (1966). Thus, "[w]hile media representatives enjoy the same right of access as the public," they often "function[] as surrogates for the public" by, for example, attending proceedings, reviewing court documents, and reporting on judicial matters to the public at large. *Richmond Newspapers*, 448 U.S. at 573; *see also United States v. Morison*, 844 F.2d 1057, 1081 (4th Cir. 1988) ("We have placed our faith in knowledge, not in ignorance, and for most, this means reliance on the press.").

For these reasons, it is well-settled that the public and the press have a right of access to court documents, generally, that arises from the public's interest in observing the consideration and disposition of matters by federal courts. *See Pub. Citizen*, 749 F.3d at 266 (explaining that "public access promotes not only the public's interest in monitoring the functioning of the courts but also the integrity of the judiciary").

The public's right of access is especially strong in matters, like the Drake Matter, that concern actions taken by the executive branch. As the U.S. Court of Appeals for the Seventh Circuit has explained, "'[I]n such circumstances, the public's right to know what the executive branch is about coalesces with the concomitant right of the citizenry to appraise the judicial branch.'" *Smith v. United States Dist. Court for S. Dist.*, 956 F.2d 647, 650 (7th Cir. 1992) (quoting *F.T.C. v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987)); *see also United States v. Aref*, 533 F.3d 72, 83 (2d Cir. 2008) (stating the "courts must impede scrutiny of the exercise of [judicial] judgment only in the rarest of circumstances," especially "when a judicial decision accedes to the requests of a coordinate branch").

Moreover, the press and the public have a particularly powerful interest in obtaining access to the specific court records that are the subject of this Application. The Reporters Committee seeks to unseal court records relating to judicial authorization for the government's use of certain electronic surveillance tools—a judicial process that is generally shrouded in secrecy. And it seeks access to such records in connection with a closed investigation in which the government obtained the communications records of a member of the news media. Public access to still sealed court records concerning search warrants, orders authorizing the use of pen registers and trap and trace devices, and Section 2703(d) orders in connection with the Drake Matter will provide the public and the press with much-needed insight into the government's use of electronic surveillance tools in leak investigations in general, and in connection with the Drake Matter, specifically.

II. The press and the public have both a common law and constitutional right of access to the sealed Search Warrant Materials, PR/TT Materials, and Section 2703(d) Materials.

"It is well settled that the public and the press have a qualified right of access to judicial documents and records filed in civil and criminal proceedings," and that "springs from the First Amendment and the common-law tradition that court proceedings are presumptively open to public scrutiny." *Pub. Citizen*, 749 F.3d at 265 (internal citations omitted). "The distinction between the rights of access afforded by the common law and the First Amendment is significant" in the Fourth Circuit. *Id*. (internal quotation omitted). The common law right "extends to all judicial documents and records, and the presumption can be rebutted only by showing that countervailing interests heavily outweigh the public interests in access." *Id*. at 265–66 (internal quotations omitted). The First Amendment right, on the other hand, applies "only to particular judicial records and documents"; when it applies, "access may be restricted only if closure is necessitated by a compelling government interest and the denial of access is narrowly tailored to serve that interest." *Id*. at 266 (internal quotations and citations omitted).

The common law provides a right of access to all judicial records and documents. *See Nixon v. Warner Commc'ns*, 435 U.S. 589, 597 (1978); *Pub. Citizen*, 749 F.3d at 265–66. The common law right is grounded in "the public's ability to keep a 'watchful eye on the workings of public agencies.'" *In re Policy Mgmt. Systems Corp.*, 67 F.3d 296, 1995 WL 541623 at *7 (4th Cir. 1995) (per curiam) (quoting *Nixon*, 435 U.S. at 597–98). Accordingly, the common law right is largely controlled by "whether public access plays a significant positive role in the functioning" of the proceedings. *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8 (1986) ("*Press-Enterprise II*"). The presumption can be rebutted only by showing that "countervailing interests heavily outweigh the public interests in access." *Pub. Citizen*, 749 F.3d at 266 (citation omitted).

To determine whether the First Amendment right of access applies to a particular type of proceeding or document, courts must consider both "experience and logic," *i.e.* (1) "whether the place and process have historically been open to the press and general public," and (2) "whether public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise II*, 478 U.S. at 8, 9 (1986); *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 64 (4th Cir. 1989). If both of these questions are answered affirmatively, the constitutional right of access applies. *Id.*

A. The common law and First Amendment rights of access apply to the Search Warrant Materials.

There are two independent rights of access to the Search Warrant Materials requested here: the common law right of access, which the Fourth Circuit has held applies to search warrant materials, and the First Amendment right of access, which applies where, as here, the investigation has ended.

1. The public has a common law right of access to the Search Warrant Materials.

The Fourth Circuit has recognized the public's common law right of access to search warrant materials such as affidavits in support of search warrant applications. *See Matter of Application & Affidavit for a Search Warrant*, 923 F.2d 324, 330 (4th Cir. 1991). Affirming the lower court's decision to unseal a search warrant affidavit before trial, the court found that the public had "significant interests" in access to search warrant materials, and "[i]n the context of the criminal justice system, these interests may be magnified." *Id.*; *see also Baltimore Sun Co.*, 886 F.2d at 64 (finding that "affidavits for search warrants are judicial records").

Other federal courts of appeals have almost uniformly found that search warrant materials in closed investigations are judicial records to which the common law right of access applies. *See In re Search of Fair Finance*, 692 F.3d 424, 433 (6th Cir. 2012) (stating that "the common law right of access to judicial documents may in some situations permit access to search warrant proceedings," including documents); *United States v. Business of Custer Battlefield Museum and Store*, 658 F.3d 1188, 1192 (9th Cir. 2011) (finding that the common law right of access applies to search warrant applications and their supporting affidavits after the government's criminal investigation ended); *In re EyeCare Physicians of America*, 100 F.3d 514, 517 (7th Cir. 1996) (holding that the common law right of access applies to a search warrant affidavit); *In re Newsday, Inc.,* 895 F.2d 74, 79 (2d Cir. 1990) (finding that a search warrant application is "a public document subject to a common law right of access" at the post-investigation stage).

2. *The public has a First Amendment right of access to the Search Warrant Materials.*

Although the Fourth Circuit has rejected a request for access to search warrant materials under the First Amendment while the government's investigation was still ongoing, the Court in that case explicitly reserved the question of whether the First Amendment right of access would apply to search warrant materials after the investigation ended. *Baltimore Sun Co*., 886 F.2d at 64–65. And courts in other circuits have held that there is a First Amendment right of access to search warrant materials after the conclusion of the government's investigation. *See United States v. Loughner*, 769 F. Supp. 2d 1188, 1195 (D. Ariz. 2011); *United States v. Kott*, 380 F. Supp. 2d 1122, 1124–25 (C.D. Cal. 2004), *aff'd on other grounds*, 135 Fed. Appx. 69 (9th Cir. 2005); *see also In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 573 (8th Cir. 1988) ("*In re Gunn*") (finding a First Amendment right of access to warrant materials even while investigation is still ongoing). Those courts that have rejected a claim of access under the First Amendment to search warrant materials, like the Fourth Circuit in *Baltimore Sun*, have done so in cases in which the government's investigation was still ongoing. *See Times Mirror Co. v. United States*, 873 F.2d 1210, 1221 (9th Cir. 1989); *United States v. All Funds on Deposit at Wells Fargo Bank*, 643 F. Supp. 2d 577, 583 (S.D.N.Y. 2009).

Based on this precedent and application of the experience and logic test, the First Amendment right of access applies to the Search Warrant Materials in this case. The government has concluded its investigation; Drake pled guilty and was sentenced in 2011. As other courts have recognized, such post-investigation search warrant materials "have historically been available to the public." *In re Application of N.Y. Times*, 585 F. Supp. 2d 83, 88 (D.D.C. 2008). In addition, public access to the Search Warrant Materials will play "a significant positive role in the functioning" of the process at issue. *Press Enterprise II*, 478 U.S. at 8. Public access will "serve[] as a check on the judiciary," *In re Application of N.Y. Times*, 585 F. Supp. 2d at 90, as well as a potential "curb on prosecutorial . . . misconduct," *In re Gunn*, 855 F.2d at 573.

B. The common law and First Amendment rights of access apply to the Section 2703(d) and PR/TT Materials.

As with search warrants, Section 2703(d) and PR/TT Materials are subject to the common law and First Amendment rights of access. These investigative tools are analogous to search warrants, and access will allow public scrutiny of both the executive and judicial branch.

1. *The public has a common law right of access to the Section 2703(d) and PR/TT Materials.*

The common law right of access clearly applies to the Section 2703(d) and PR/TT Materials. The Fourth Circuit has had "no difficulty holding that the actual § 2703(d) orders and subsequent orders issued by the court are judicial records." *In re United States for an Order*

Pursuant to 18 U.S.C. Section 2703(d), 707 F.3d 283, 290 (4th Cir. 2013) ("*In re United States*"). As with search warrants, Section 2703(d) orders and orders authorizing the use of PR/TT devices, as well as any subsequent, related court orders, are judicial records. *Id.* ("[I]t is commonsensical that judicially authored or created documents are judicial records."). Keeping with this principle, courts have held that the common law right of access attaches to Section 2703(d) applications, motions, and orders, as well as orders authorizing the use of PR/TT devices. *See id.* (holding that motions filed under Section 2703(d) were judicial records because they were filed with the objective of obtaining judicial action or relief pertaining to Section 2703(d) orders); *In re Application of the United States for an Order Pursuant to 18 U.S.C. Section 2703(d)*, 830 F. Supp. 2d 114, 151–52 (E.D. Va. 2011) (applying the common law right of access balancing test to materials related to a Section 2703(d) order); *In re Sealing & Non-Disclosure of PR/TT/2703(D) Orders*, 562 F. Supp. 2d 876, 891 (S.D. Tex. 2008) ("*In re Sealing"*) (writing that "opinions, orders, judgments, docket sheets, and other information related to the court's public functions" are in the "top drawer of judicial records" that are "hardly ever closed to the public"). Accordingly, the Section 2703(d) orders, orders authorizing the use of PR/TT devices, and any subsequent, related court orders issued in connection with the Drake Matter are judicial records subject to a strong presumption of access under the common law.

In addition, just as this Court and other appellate courts have held that applications and supporting affidavits for search warrants are judicial records, applications and supporting affidavits for Section 2703(d) orders and orders authorizing the use of PR/TT devices are likewise judicial records because, among other things, they are considered by the court in determining whether to issue the order being sought by the government. *See Baltimore Sun Co.*, 886 F.2d at 64 ("We therefore conclude that affidavits for search warrants are judicial records.").

Section 2703(d) provides that the court shall issue a Section 2703(d) order "only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe" the communications content or communications metadata "are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). Thus, the applications and supporting affidavits form the basis for the court's determination of whether the government has met the statutory standard for issuance of a Section 2703(d) order, which is "essentially a reasonable suspicion standard." *In re United States*, 707 F.3d at 287. Likewise, before a court is required to enter an order authorizing the installation and use of a pen register or trap and trace device, it must conclude that "the attorney for the Government has certified to the court that the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation." 18 U.S.C. § 3123(a)(1). The application thus plays a decisive role in the court's determination as to whether use of a PR/TT device should be authorized.

Finally, motions related to Section 2703(d) orders and PR/TT orders other than applications also play a key role in the adjudicatory process and therefore are judicial records. Such derivative motions are filed with the objective of obtaining judicial action or relief, and the court relies upon such filings in granting or denying the relief sought. Consistent with this reasoning, the Fourth Circuit has held that derivative Section 2703(d) motions are judicial records because they play a role in the adjudicative process; namely, "they were filed with the objective of obtaining judicial action or relief pertaining to § 2703(d) orders." *In re United States*, 707 F.3d at 291. For these reasons, any derivative Section 2703(d) and PR/TT motions are judicial records to which the common law right of access applies.

2. *The public has a First Amendment right of access to the Section 2703(d) and PR/TT Materials.*

To date, no federal court of appeals has squarely addressed the question of whether the First Amendment right of access applies to Section 2703(d) orders in the context of a closed investigation. The Fourth Circuit addressed the question in the context of an ongoing criminal investigation and concluded only that the First Amendment right of access did not apply in that context. *In re United States*, 707 F.3d at 292. In that case, petitioners sought access to Section 2703(d) orders and related documents at the pre-grand jury phase of an ongoing investigation. *Id.* at 286. The Fourth Circuit found that, at that early phase in the proceedings, "secrecy is necessary for the proper functioning of the criminal investigations," and that "openness will frustrate the government's operations." *Id.* at 292. Similarly, a court in the Eastern District of Virginia found no justification for unsealing certain documents related to a Section 2703(d) order because there is "no history of openness for documents related to *an ongoing criminal investigation*," and there were "concerns that publication of the documents *at this juncture* will hamper the investigatory process." *In re Section 2703(d)*, 787 F. Supp. 2d 430, 443 (E.D. Va. 2011) (emphasis added). There is no ongoing investigation here; Drake has been indicted, pled guilty, and been sentenced. *See id*. at 442 (contrasting the ongoing investigation in that case to *Matter of Application and Affidavit for a Search Warrant*, 923 F.2d at 326, in which the Fourth Circuit affirmed a decision to unseal a search warrant affidavit because the investigation had concluded). Accordingly, *In re United States* and *In re Section 2703(d)* are inapposite.

The Section 2703(d) Materials and PR/TT Materials at issue here are analogous to search warrant materials from closed investigations. As discussed above, other courts have held that search warrant materials are subject to the First Amendment right of access in the post-investigation context. *See, e.g., In re Application of N.Y. Times,* 585 F. Supp. 2d at 90. Relying on this persuasive precedent, and applying the experience and logic test, it is clear that the First Amendment right of access applies to both the Section 2703(d) Materials and PR/TT Materials.

First, the tradition of public access to post-investigation search warrant materials applies to the Section 2703(d) Materials and PR/TT Materials. *See United States v. El-Sayegh,* 131 F.3d 158, 161 (D.C. Cir. 1997) (stating that "[a] new procedure that substituted for an older one would presumably be evaluated by the tradition of access to the older procedure"); *see also United States v. Gonzales*, 150 F.3d 1246, 1256 (10th Cir. 1998) (noting that the experience prong may be satisfied by establishing a history of access to information "reasonably analogous" to the information sought). As the D.C. district court recognized in *In re Application of N.Y. Times*, "post-investigation warrant materials . . . have historically been available to the public," as shown by the "routine historical practice" of filing warrant applications and receipts with the clerk of court without seal. *See In re Application of N.Y. Times*, 585 F. Supp. 2d at 88. Moreover, that court found that the historic common law right of access to warrant materials, which was "an appropriate consideration to take into account when examining the scope of First Amendment," also "weigh[ed] strongly in favor of a First Amendment qualified right of access to warrant materials." *Id.* at 89. The Section 2703(d) and PR/TT Materials, which are analogous to search warrants, must be evaluated by this same historic tradition of access. *See El-Sayegh*, 131 F.3d at 161; *Gonzales*, 150 F.3d at 1256.

Second, just as with post-investigation search warrants, logic strongly supports a First Amendment right of access to the Section 2703(d) and PR/TT Materials at issue here. *See In re Application of N.Y. Times*, 585 F. Supp. 2d at 90 ("Specifically, with respect to warrants, openness plays a significant positive role in the functioning of the criminal justice system, at least in the post-investigation stage."). Because Section 2703(d) orders and orders authorizing the use of PR/TT devices function like warrants, but may be obtained on a showing *lower* than the probable cause standard that must be satisfied to obtain a search warrant under Federal Rule of Criminal Procedure 41, *see* 18 U.S.C. § 2703(d) and 18 U.S.C. § 3123(a)(1), access to such materials arguably plays an even *more* "significant positive role in the functioning of the criminal justice system." *In re Application of N.Y. Times Co.,* 585 F. Supp. 2d at 90.[3] Access to the Section 2703(d) and PR/TT Materials at issue here will allow the public to scrutinize the arguments the government put forth in support of their applications for Section 2703(d) orders and orders authorizing the use of PR/TT devices in connection with its investigation of Drake, as well as the basis for any court order granting or denying such applications. Thus, access will allow the public to serve as a check on prosecutors and "is necessary in the long run so that the public can judge the product of the courts in a given case." *See Virginia Dep't of State Police v. Wash. Post*, 386 F.3d 567, 575 (4th Cir. 2004) (quoting *Columbus-America Discovery Group v. Atlanta Mut. Ins. Co*., 203 F.3d 291, 303 (4th Cir. 2000)); *see also In re Gunn*, 855 F.2d at 573.

III. The press and the public have both a common law and constitutional right to access the court dockets for the Search Warrant Materials, PR/TT Materials, and Section 2703(d) Materials.

Both the common law and constitutional rights of access extend to court dockets, which reflect court records related to search warrants, PR/TT devices, and Section 2703(d) orders. The common law right extends to dockets because sealing dockets in their entirety creates a "two-tier system, open and closed," that erodes "[c]onfidence in the accuracy of [the court's] records" and

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[3] Orders authorizing the installation and use of PR/TT devices may be obtained *ex parte* by the government on a certification that "the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation." 18 U.S.C. § 3123(a)(1). A Section 2703(d) order may be issued "if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d).

"the authority of its rulings and respect due its judgments." *CBS, Inc. v. U.S. Dist. Court for Cent. Dist. of Cal.*, 765 F.2d 823, 826 (9th Cir. 1985). In addition, several Circuits, including the Fourth Circuit, have recognized that the constitutional right of access also extends to court dockets. *See Pub. Citizen*, 749 F.3d at 268 (holding that there is a First Amendment right of access to dockets in civil proceedings); *In re State–Record Co.,* 917 F.2d 124, 129 (4th Cir. 1990) (per curiam) (reversing the sealing of criminal docket sheets as overbroad and incompatible with the First Amendment presumptive right of access and stating, "we can not understand how the docket entry sheet could be prejudicial"); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93–94 (2d Cir. 2004) (holding that docket sheets in civil and criminal proceedings "enjoy a presumption of openness and that the public and the media possess a qualified First Amendment right to inspect them"); *Tri-Cty. Wholesale Distributors, Inc. v. Wine Grp., Inc.*, 565 F. App'x 477, 490 (6th Cir. 2012) ("The First Amendment access right extends to court dockets, records, pleadings, and exhibits . . ."). The public and the press therefore have a right to access the docket sheets reflecting the Search Warrant, Section 2703(d), and PR/TT Materials related to the Drake Matter.

IV. The Government cannot meet its burden to overcome the presumption of access to the Search Warrant Materials, the PR/TT Materials, and the Section 2703(d) Materials.

Under the common law, there is a presumption in favor of disclosure that the government can only overcome by showing that countervailing interests heavily outweigh the public's strong interest in access. Under the First Amendment, there is an even stronger presumption in favor of access, and the government must show a compelling interest to overcome it. Here, the government cannot show a countervailing interest, let alone a compelling interest, sufficient to overcome the strong presumption in favor of public access to the materials at issue here.

A. The government cannot overcome the common law presumption in favor of disclosure of the Search Warrant, Section 2703(d), and PR/TT Materials.

"Regardless of whether the right of access arises from the First Amendment or the common law, it 'may be abrogated only in unusual circumstances.'" *Virginia Dep't of State Police*, 386 F.3d at 576 (quoting *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 178, 180 (4th Cir. 1988)). The common law presumption "in favor of access," *Matter of Application and Affidavit for a Search Warrant*, 923 F.2d at 329, can be overcome only upon a showing that countervailing interests "heavily outweigh" the public's interest in access. *Rushford v. New Yorker Magazine*, 846 F.2d 249, 253 (4th Cir. 1988). The party seeking to overcome this presumption bears the burden of showing "some significant interest" outweighing the presumption. *Virginia Dep't of State Police*, 386 F.3d at 575. In evaluating a request for access to court records under the common law, courts in the Fourth Circuit will consider "whether the records are sought for improper purposes, such as promoting public scandals or unfairly gaining a business advantage; whether release would enhance the public's understanding of an important historical event; and whether the public has already had access to the information contained in the records." *Id*. (quoting *In re Knight Publ. Co.*, 743 F.2d 231, 235 (4th Cir. 1984)).

Under this test, the Search Warrant, Section 2703(d), and PR/TT Materials should be unsealed. First, none of the court records at issue is being sought for an improper purpose; the Reporters Committee seeks access to them for the benefit of the press and public at large. Second, the sealed materials at issue here would inform the public's understanding of the Drake Matter, one of a number of important leak prosecutions pursued by the government under the Obama Administration. Finally, some of the information sought is already in the public forum. The public knows that Drake's e-mail communications were a target of search warrants, that he was indicted for allegedly disclosing national defense information to a journalist, and that he pled guilty to a criminal charge. Accordingly, even though the Search Warrant, Section 2703(d), and PR/TT Materials are sealed, much of their underlying subject matter is in the public forum, a factor that weighs in favor of disclosure. Moreover, the government no longer has an interest in keeping these records sealed because the Drake Matter has ended, and Drake has been sentenced. *Cf. In re Section 2703(d)*, 787 F. Supp. 2d at 442–43 (finding that because the investigation was ongoing, "the government's interest in keeping these documents sealed *for the time being* outweighs petitioners' interest in access them") (emphasis added); *In re Application of the U.S. for an Order Pursuant to 18 U.S.C. Section 2703(d)*, 830 F. Supp. 2d at 151–52 (applying the common law balancing test to a Section 2703(d) application and supporting materials, and finding that the government had a "compelling interest in protecting its *ongoing* investigation") (emphasis added).

On the other side of the common law balancing test, the public interest in access to the Search Warrant, Section 2703(d), and PR/TT Materials is exceptionally strong. The Drake prosecution and underlying investigation are matters of considerable public concern, and the public has "legitimate concerns about methods and techniques of [the] . . . investigation," *Matter of Application and Affidavit for a Search Warrant*, 923 F.2d at 330, including specifically how the government obtained and used search warrants, Section 2703(d) orders, and pen registers and trap and trace devices in its investigation. The Fourth Circuit and the U.S. Supreme Court have recognized the importance of the public interest in "keep[ing] a watchful eye on the workings of public agencies" and "publish[ing] information concerning the operation of government," *id.* (quoting *Nixon*, 435 U.S. at 597-98), and that this interest is "magnified" in the context of the criminal justice system. *Id*.

In sum, because the common law balancing test weighs heavily in favor of disclosure and no factors weigh against disclosure, the Court should grant the Reporters Committee's Application to unseal the Search Warrant, Section 2703(d), and PR/TT Materials pursuant to the common law right of access.

B. The government cannot demonstrate a compelling interest that justifies the continued sealing of the Search Warrant, Section 2703(d), and PR/TT Materials.

The First Amendment right of access is "a more rigorous right of access" that is "more demanding of public disclosure than the common law public right of access." *Johnson v. Baltimore City Police Dep't*, 2013 WL 497868 at *2 (D. Md. Feb. 7, 2013) (quoting *Rushford*, 846 F.2d at 253). A document to which the First Amendment right of access applies may remain under seal only if "specific, on the record findings are made demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *Press–Enterprise II*, 478 U.S. at 13–14 (quoting *Press–Enterprise I*, 464 US. at 510). Put another way, the constitutional right of access is overcome only if "(1) closure serves a compelling interest; (2) there is a 'substantial probability' that, in the absence of closure, that compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect that compelling interest." *In re Wash. Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986).

Because the government's investigation and prosecution of Drake has concluded, there is no compelling interest in the continued sealing of the Search Warrant, Section 2703(d), and PR/TT Materials. Indeed, in light of Drake's guilty plea, there can be no law enforcement interest implicated by public disclosure of the Search Warrant, Section 2703(d), and PR/TT Materials. *See Rushford*, 846 F.2d at 252 (citing *In re Wash. Post Co.*, 807 F.2d at 389, for the proposition that "because the taking of a guilty plea serves as a substitute for a trial, it may reasonably be treated in the same manner as a trial for First Amendment purposes").

Moreover, even if portions of the records sought by this Application implicated an ongoing law enforcement interest, courts have found that sealing must be narrowly tailored. *See Johnson,* 2013 WL 497868 at *3–5 ("If a court record is subject to the First Amendment right of public access, the record may be sealed 'only on the basis of a compelling governmental interest, and only if the denial is narrowly tailored to serve that interest." (internal quotations and citation omitted)); *Press-Enterprise I* 468 U.S. at 510 (finding that closure of records must be narrowly tailored to serve the compelling government interest). As such, to the extent that the government could identify some compelling interest that justified sealing some portion of the Search Warrant, Section 2703(d), or PR/TT Materials, redaction—not wholesale sealing—would be the appropriate means of addressing that interest.

C. The Local Rules of this Court support unsealing.

The District of Maryland's Local Rules confirm that the materials sought here should be unsealed. Local Rule 105.11 requires that "[a]ny motion seeking the sealing of pleadings . . . or other documents . . . shall include (a) proposed reasons supported by specific factual representations to justify the sealing and (b) an explanation why alternatives to sealing would not provide sufficient protection." Local Rule 105.11 (D. Md. 2016). This rule derives from the presumption of openness that is required by the common law right of access. *See Simpson v. Technology Service Corporation*, 2015 WL 6447253 at *3 (D. Md. Oct. 22, 2015) ("This Local Rule endeavors to protect the common-law right to inspect and copy judicial records and documents, . . . while recognizing that competing interests sometimes outweigh the public's right of access." (internal citation omitted)). Pursuant to this rule, federal district courts in Maryland require specific examples of harm that would be caused by the unsealing rather than mere conclusory objections to unsealing. *See, e.g., Brown v. Lorings*, 2014 WL 6687120 at *3 (D. Md. Nov. 25, 2014) (denying motion to seal where plaintiff summarily stated that civil case was preventing him from getting hired); *see also In re Search of 8420 Ocean Gateway Easton, Maryland*, 353 F. Supp. 2d 577, 583 (D. Md.), *aff'd sub nom. In re Search Warrants Issued on Apr. 26, 2004*, 353 F. Supp. 2d 584 (D. Md. 2004) (noting with approval that the Fourth Circuit in *Baltimore Sun* gave specific examples of situations where an affidavit may need to be sealed after execution: descriptions of "continuing investigations," disclosure of "information gleaned from ongoing wiretaps," and identification of "informers whose lives would be endangered"); *accord Baltimore Sun*, 886 F.2d at 66 (taking a similar approach in applying the *Press-Enterprise* test, noting that "conclusory assertions are insufficient to allow review; specificity is required"). Moreover, even where specific examples of harm may exist, "the court should consider less drastic alternatives to sealing, such as filing redacted versions of documents." *Simpson*, 2015 WL 6447253 at *3.

CONCLUSION

The press and public have a right of access to the Search Warrant, Section 2703(d), and PR/TT Materials related to the government's completed investigation and prosecution of Drake under both the common law and the First Amendment. The Court should, for the foregoing reasons, grant the Reporters Committee's Application for an order unsealing the Search Warrant, Section 2703(d), and PR/TT Materials.

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Respectfully submitted,

/s/ Katie Townsend
Katie Townsend
Bar No. 19756
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1250
Washington, D.C. 20005
Phone: 202.795.9300
Facsimile: 202.795.9310
ktownsend@rcfp.org

Counsel for Applicant the Reporters Committee for Freedom of the Press

Bruce Brown*
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1250
Washington, D.C. 20005
Phone: 202.795.9300
Facsimile: 202.795.9310

**Of Counsel for Applicant the Reporters Committee for Freedom of the Press*